hearing. Thus in the ordinary way one speaks of hearing from a friend from whom one has received a letter, the words of which make an impact on one not through one's ears but through one's eyes.

We find support for our view in the words of Lord Loreburn L.C. at page 182 in *Board of Education* v. *Rice*: [5]

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

Here too when deciding whether or not to dismiss the plaintiff the defendants were deciding a matter to be settled by discretion, involving no law, namely an administrative matter, and they are not bound to treat such a matter as a trial, they had no power to administer an oath and need not examine witnesses; all they had to do was to give a fair opportunity to the plaintiff for correcting or contradicting any relevant statement prejudicial to his view, of which here there is no question.

In *Mahadevan* v. *Anandarajan and Others*,[6] an appeal from here involving the expulsion of a pupil from a school in Seremban, Lord Diplock giving the advice of the Judicial Committee said in his last paragraph —

"In relation to such administrative matters as the expulsion of a pupil from a school it would be quite inappropriate to model the procedure on that of a criminal trial. All that natural justice requires is that the person charged with making the decision should act fairly."

Then His Lordship added significantly —

"What is fair depends on the circumstances and is a matter of common sense."

In *Regina* v. *Aston University Senate, Ex parte Roffey and Another*[7] where some students had been expelled by a university for failing their examinations, counsel for the university conceded that the concept of natural justice applied and Donaldson J., delivering the main judgment of the Divisional Court, held that before expelling them the university should have given them a reasonable opportunity of being heard, but he did not say that they must necessarily be given an oral hearing; on the contrary he said at page 554 that they "should be given an opportunity to be heard either orally or *in writing*, in person or by their representatives as might be appropriate."

There is no evidence here that the plaintiff ever demanded an oral hearing before his dismissal. If he had and been refused, then probably he would have had a stronger case, but as it is he is in the same weak position as Mr. Fernando in *Ceylon University* v. *Fernando*[8] where Lord Jenkins, giving the advice of the Privy Council, quoted with approval at page 232 the following words of Harman J. (as he then was) in *Byrne* v. *Kinematograph Renters Society Ltd.*: [9]

"What then are the requirements of natural justice in a case of this kind? First, I think that the accused person should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more."

Here the plaintiff does not say that he did not know the nature of the accusation made against him by Government; he was given an opportunity to state his case, albeit in writing; and he does not say that the defendants did not act in good faith. His only complaint is that he was not given an oral hearing; but there is no evidence that he ever asked for one either before his dismissal or soon thereafter. Indeed he waited a year before filing his suit.

Therefore in our opinion the defendants have followed the correct procedure when dismissing the plaintiff and his appeal should and is accordingly dismissed, with costs.

To sum up, our answers to the three issues are as follows:

(a) Where the defendants could have proceeded against the plaintiff either under Cap. D or the 1970 regulations, they were within their rights in choosing to proceed against him under Cap. D;

(b) When proceeding against him under Cap. D the defendants should have given him a reasonable opportunity of being heard; and

(c) In the circumstances of this case, an oral hearing was unnecessary and the defendants have given the plaintiff a reasonable opportunity of being heard.

Appeal dismissed.

Solicitors: *Lovelace & Hastings.*

CANTRANS SERVICES (1965) LTD. v. CLIFFORD

[F.C. (Azmi L.P., Ali and Ong Hock Sim F.JJ.) March 1, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 49 of 1973]

Practice and Procedure — Leave to serve writ out of jurisdiction — Application to set aside order — Contract made subject to law of Canada — No proof that defendant has property within jurisdiction — R.S.C. 1957, O. 11 r. 1(j).

This was an appeal from the decision of a judge of the High Court dismissing the appellants' application to set aside the order of the Senior Assistant Registrar granting the respondent leave to issue a writ of summons and to serve notice thereof in Canada, outside the jurisdiction of the court. The contract between the parties expressly declared that the contract was to be deemed to be made in British Columbia, Canada. It was conceded that the breach of contract took place in Canada. The respondent admitted that the appellants are a limited company incorporated and resident in Canada with no registered place of business in Malaysia. He however based his claim on O. 11 r. 1(j) of the Rules of the

Supreme Court alleging that the appellants have property within the jurisdiction and that the respondent's claim cannot be satisfied save by means of a judgment or order of the High Court of the Federation.

Held: (1) there was non-disclosure of material facts sufficient for the court to set aside the order of the learned judge dismissing the application by the appellants;

(2) the respondent has not shown that the appellants have property within the jurisdiction which could be made available to satisfy the claim and the appeal must be allowed and the order granting leave to serve out of jurisdiction be set aside.

Cases referred to:-

(1) *The Hagen* [1908] P. 189 at p. 201.

(2) *In re J.L. Young Manufacturing Co. Ltd.; Young* v. *J.L. Young Manufacturing Co. Ltd.* [1900] 2 Ch. 753 at p. 754.

(3) *George Monro Ltd.* v. *American Cyanamid & Chemical Corporation* [1944] 1 K.B. 432.

(4) *Machender & Ors.* v. *Feldia & Ors.* [1967] 2 Q.B. 590.

FEDERAL COURT.

C. W. M. Abraham for the appellants.

S. D. K. Peddie for the respondents.

Ong Hock Sim F.J.: This appeal is from the decision of the learned judge dismissing the appellants' application to set aside the order of the Senior Assistant Registrar made on December 14, 1972 granting respondent leave to issue a writ of summons against the appellants and to serve notice of the said writ at No. 395 West Broadway, Vancouver 10, British Columbia, Canada, a place outside the jurisdiction of the court.

The basis of their application to set aside the order was that the subject matter of the action was not within the meaning of Order 11, rule 1 of the Rules of the Supreme Court 1957. It is not in dispute that clause 14 of the service agreement entered into on September 19, 1969 between the appellants and the respondent expressly declared that "This contract shall be deemed to be made in British Columbia, Canada." It is conceded that there was a breach of this contract and that such breach took place in Canada. The respondent admits in his affidavit that the appellants are a limited company incorporated and resident in Canada with no registered place of business in Malaysia. On these grounds, it is urged that the High Court in West Malaysia has no jurisdiction to try the action and the proper forum is Canada.

Respondent's counsel stated that their application is based solely on Order 11 rule 1(j) which has no equivalent in the English Rules. It reads:

"Order 11

1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever —

(j) The court is satisfied —

(i) that the defendant has property within the jurisdiction which could be made available to satisfy the claim of the plaintiff, and

(ii) that the plaintiff's claim cannot be satisfied save by means of a judgment or order of the High Court of the Federation."

He then referred to paragraphs 7 and 8 of the affidavit of the respondent affirmed at Kuala Lumpur on December 5, 1972, which I now set out:

"7. By reason of the provisions of my contract as set out in paragraph 2(h) hereof I instructed my solicitors to have enquiries made in British Columbia regarding the abovenamed intended Defendant for the purpose of ascertaining whether I was likely to be able to recover damages there. I am advised by my solicitors and verily believe that they have received a report from their agents in British Columbia to the effect that, as at the date of their report which is dated 6th November 1972, the abovenamed intended Defendant was a private company which had filed its last annual report on the 13th April 1970 that annual report being made up to the 5th September 1969. Although it had an authorised capital of Canadian $250,000.00 divided into $50,000.00 'A' preference shares and $10,000.00 'B' common shares only two (2) shares for a total price of Canadian twenty (20) cents had been issued at the date of the report. There were only two shareholders and these shareholders were also the sole directors.

8. By reason of the fact that the abovenamed intended Defendant's contract with the Majlis Amanah Ra'ayat does not terminate until 31st December 1972 and that payments will be due to the abovenamed intended Defendant under the provisions of the contract the abovenamed intended Defendant has property within the jurisdiction of this court which could be made available to satisfy my claim and I verily believe that, by reason of the matters set out in paragraph 7 hereof, my claim cannot be satisfied save by means of a judgment or order of this court."

As Farwell L.J. said in *"The Hagen"*: [1]

"During these present sittings Vaughan Williams L.J. and myself have on more than one occasion had to consider Order XI., and we have had many authorities discussed and fully considered by the court, and the conclusion to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J., in *Societe Generale de Paris* v. *Dreyfus Brothers* ((1885) 29 Ch. D. 239, at p. 242) that 'it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked, and whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.' The second point which we considered established by the cases was this, that, if on the construction of any of the sub-heads of Order XI. there was any doubt, it ought to be resolved in favour of the foreigner; and the third is that, inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the court in discharging the order, even although the party might afterwards be in a position to make another application."

Lord Alverstone C.J. in *In re J. L. Young Manufacturing Company Limited; Young* v. *J. L. Young Manufacturing Company Limited*[2] said:

"...In my opinion so-called evidence on 'information and belief' ought not to be looked at at all, not only unless the court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by some one who speaks from his own knowledge."

It may be noted here that the record does not set out the notes of evidence of the Senior Assistant Registrar at the hearing of the *ex parte* application, pursuant to which the order of December 14, 1972 was made. The affidavit of the respondent in support thereof did not disclose either his agreement with the appellants or the agreement between the appellants and Majlis Amanah Ra'ayat, both executed on September 19, 1969. The identity of the solicitors or their agents is also not given. The report of the agents to the solicitors is not attached. No affidavit by the solicitors or their agents corroborating the respondent's statement in paragraph 7 of his affidavit has been filed herein.

In support of their application to set aside the order of the Senior Assistant Registrar the appellants annexed to their affidavit affirmed on February 7, 1973 a copy of the service agreement marked "I.G.P. 3" clause 1 whereof recited that a true copy of the agreement between the appellants and MARA was attached thereto as Schedule 'A' hereto. This was inadvertently omitted in the record filed but appears in the affidavit in support of the motion to adduce further evidence in Federal Court Civil Appeal No. 49 of 1973. I have perused this agreement and for reasons which I shall hereafter state, I am of the opinion that there was non-disclosure of material facts sufficient in the light of the two authorities referred to earlier for this court to set aside the order of the learned judge dismissing the application of the appellants.

As Lord Alverstone stated in *The Hagen* (*cit*):

"If I had felt that Bargrave Deane J. had taken all the facts into consideration and had come to a conclusion upon them, I should hesitate to interfere with his decision, but looking at the judgment I can find nothing to shew that he did. I come to the conclusion that he has not exercised his discretion, and I think it is a jurisdiction that ought to be very carefully exercised."

As Scott L.J. said in *George Monro, Limited* v. *American Cyanamid and Chemical Corporation*[3] the headnote to which at page 433 I now set out:

"Service of a writ out of the jurisdiction is an interference with the exclusive jurisdiction of the sovereign power of the State where the service is effected. As a matter of international comity such service should not be allowed unless it is clearly within both the letter and the spirit of Or. XI, r. I."

This statement of the law was reaffirmed by Diplock L.J. in *Mackender and Others* v. *Feldia and Others*[4] and I quote from the headnote at page 591:

"The jurisdiction which the High Court claims over defendants who are neither present nor ordinarily resident in this country, when it grants leave under R.S.C., Ord. 11, is a claim which conflicts with the general principles of comity between civilised nations, and it is one which should be exercised with caution."

As I have said there is nothing to show what transpired at the *ex parte* application before the Senior Assistant Registrar. Without meaning any disrespect to the officer, I would draw attention to what du Parcq L.J. has to say in the *George Monro* case (*cit*) at page 441:

"Jurisdiction in respect of service abroad is now exercised by the masters. From 1852 until, I think, 1937 it had always previously been exercised by a judge of the High Court. I say nothing as to the desirability of the change in the rule except that I am sure that it must not be regarded as indicating that the rule-making authority intended to minimize the gravity of the jurisdiction. Whoever exercises that jurisdiction, it should always be remembered that an application under the rule should never be granted without full knowledge and careful consideration of all the relevant circumstances."

Clause 14 of the service agreement is explicit that "This contract shall be deemed to be made in British Columbia, Canada, and for all purposes shall be construed in accordance to the laws of the Province of British Columbia." In my view, though not expressly providing that all disputes in connection therewith shall be subject exclusively to the jurisdiction of the Courts of British Columbia, it is clearly intended so to do. I quote again the headnote in the *Mackender* case (*cit.* page 591):

"*Per* Diplock L.J.: The *prima facie* rule of English conflict of laws is that the proper law of a contract is that system of law which the parties have agreed shall regulate the legally enforceable rights and duties to which their agreement gives rise. Here the parties expressly agreed that the proper law of the policy should be Belgian law."

Upon the facts of the case and in the light of the authorities referred to, I am of the view that the learned judge erred in dismissing the application. It is true that he purported to act under Order 11 rule 1(j), which has no equivalent in the English rules and has never, I believe, been construed by our courts. As he says:

"Paragraphs 7 and 8 of the plaintiff's affidavit dated December 5, 1972 have not been challenged by the defendant company. It has not been disputed that, according to the defendant company's annual report filed on April 13, 1970, although it has an authorised capital of Canadian $250,000/-, only two shares for a total value of Canadian twenty cents had been issued as on November 6, 1972, and that there were only two shareholders and they were also the sole directors."

This seems irrelevant in determining *whether the appellants have property within the jurisdiction.* It may perhaps be relevant in considering whether the respondent would be able to enforce any judgment obtained in respect of his wrongful dismissal. He went on:

"It has further not been denied that a certain contract between the defendant company and Majlis Amanah Ra'ayat (MARA) did not terminate until December 31, 1972 and that payment would be due to the defendant company under the provisions of that contract. From the uncontradicted evidence, it is therefore abundantly clear that the defendant company has property within the jurisdiction of this court which could be made available to satisfy the plaintiff's claim for damages, and having regard to the issued capital of the defendant company in Canada, the plaintiff's claim certainly cannot be satisfied except by means of a judgment or order of this court."

With respect, I would say that the judge failed to observe that the amount of the issued capital can always be verified, yet MARA and the respondent were prepared to enter into contracts with the appellants, involving heavy financial commitments. The appellants have been operating, I assume, even before September 19, 1969 on an issued capital of twenty cents (Canadian) and still do. I have perused the service agreement and that with MARA which latter the judge had not been afforded an opportunity to scrutinize before coming to his decision. In this latter agreement, clause 16 is very important. I now reproduce it:

"16. TERMS OF PAYMENT

The parties hereto do further mutually covenant and agree:—

(a) that forthwith after the execution of this Agreement MARA shall pay in Canadian funds in Vancouver, British Columbia, Canada, to the account of Cantrans in the Royal Bank of Canada, Broadway and Granville Street Branch, in the City of Vancouver as aforesaid, the sum of One Hundred Thousand Dollars ($100,000.00) being the agreed amount of the contract down payment as set out in Schedule 'C' to this within Agreement.

(b) that after the commencement of Cantrans Services under this Agreement MARA shall pay for all consulting engineering services, project management services, purchasing services, other engineering services, and technical management services, in accordance with the schedule of fixed fee payments outlined in Schedule 'C' to this within Agreement in the amounts set out in accordance with the appropriate consecutive month as outlined therein. Further, the said monthly payment shall be paid within five (5) days of the last day of each month in Canadian

funds payable in Vancouver, British Columbia, Canada, to the account of Cantrans in the said Royal Bank of Canada as aforesaid.

(c) that after the commencement of Cantrans Services under this Agreement MARA shall pay for all disbursements properly incurred by Cantrans as hereinbefore defined, the budgets for which are outlined in Schedule 'E' to this within Agreement, upon presentation to MARA by Cantrans of invoices with appropriate vouchers and details attached thereto. The said payments for disbursements properly incurred shall be paid within ten (10) days of the last day of each month in which the invoices are presented in funds in accordance with the terms of sub-paragraph (c) of Paragraph 15 hereof.

(d) MARA shall arrange all banking requirements for payments and be responsible for all bank charges. Further, that exchange control permission shall be obtained by MARA for payments to be made hereunder in currency other than that of Malaysia.

(e) at the end of each quarter (¼) year so long as this Agreement is in full force and effect, an audit shall be completed on the accounts of Cantrans and all other necessary firms, corporations, or individuals connected with Cantrans in the execution of this said project, in order to ascertain the exact amount of payments due to Cantrans in carrying out its duties and obligations hereunder. This audit shall be done by Messrs. Peat, Marwick, Mitchell & Co., Chartered Accountants, or other independent professional auditor as may be appointed by Cantrans with the approval of MARA. If the final audited invoices are shown to be in excess of payments received by Cantrans, the excess shall be paid by MARA to Cantrans on the date of the next forthcoming invoice for disbursements properly incurred. If the final audited invoices are found to be less than payments already received by Cantrans then the difference shall be deducted from the next forthcoming invoice for disbursements properly incurred by Cantrans.

(f) if the stipulated payment arrangements referred to in this paragraph and elsewhere in this Agreement are not in full force and effect and are not paid in such amounts as aforesaid at all times during the currency of this Agreement, or if the advances of local currency as aforesaid are not made promptly at any time, and such default shall continue for more than fifteen (15) days, then fifteen (15) days after notice in writing thereof shall have been served by Cantrans on MARA, Cantrans shall have the right to terminate its services under this Agreement without further notice to MARA and Cantrans shall be entitled to receive from MARA the sums and indemnification as set forth in sub-paragraph (g) of this paragraph.

(g) if for any reason the services of Cantrans under this Agreement shall be terminated, Cantrans shall be entitled to receive those portions of the amounts as set out in Schedule 'C' to this within Agreement to which it would have been entitled to the end of the month during which the services are so terminated, and to the end of the next two (2) succeeding calendar months. Cantrans shall be entitled to present its invoices to MARA and MARA shall forthwith pay same in accordance with the arrangements hereinbefore set out. The parties hereto agree that it is expensive for Cantrans to cease the performance of its services hereunder once commenced, that it is difficult to calculate the losses suffered thereby and the cost thereof to Cantrans, and that the sums aforesaid to which Cantrans is entitled upon termination of its services hereunder, are by way of liquidated damages and not as a penalty. In addition. MARA shall forthwith pay to Cantrans all amounts including all expenses, charges and other items of expenses properly incurred by Cantrans pursuant to this within Agreement. All other obligations properly incurred by Cantrans for the account of MARA or for the carrying out of this Agreement by Cantrans and which may continue after termination shall be assumed and paid by MARA as and when the same are due and payable and MARA shall indemnify and save harmless Cantrans therefrom. Upon such termination it will be the duty of Cantrans to take all necessary steps to reduce as rapidly as possible, the services then being provided under this Agreement and Cantrans will accordingly:—

(i) stop forthwith all services then being done by it;

(ii) terminate the employment of the work of the personnel hired by it;

(iii) terminate with as much speed and as little cost to MARA as in Cantrans' opinion is practical all other engagements and contracts entered into pursuant to this within Agreement if same can be terminated; and

(iv) not begin any new work nor enter into any new engagements or contracts or other services on behalf of MARA:

Provided always, that Cantrans will remain subject through such termination period to the reasonable and logical conclusion of the contract and the obligations undertaken by it hereunder and will continue to render throughout that period any services within the scope of this Agreement which it may be logical to so render and make payment for and in particular, Cantrans will, if requested, concentrate on completing any services or work which MARA particularly desires to be so completed."

It will be seen that the appellants had after the execution of the agreement with MARA $100,000.00 in their account with the Royal Bank of Canada (paragraph (a)). In terms of the agreement all payments by MARA to the appellants were to be paid into the account of the appellants with the Royal Bank of Canada (paragraph (b)). MARA had to make all banking arrangements and obtain exchange control permission to remit monies due (paragraph (d)). *I reproduce paragraph (c) of clause 15* referred to in paragraph (c) of clause 16:

"Clause 15(c): for all consulting engineering services, project management services, purchasing services, other engineering services, technical management services, and all disbursements properly incurred in connection therewith, schedules and budgets for which have been hereinbefore referred to and are outlined in the memorandums attached to this within Agreement as Schedule 'C' and 'E' hereto, in lawful money of Canada payable in the City of Vancouver, in the Province of British Columbia, Canada, except that any expenses incurred by Cantrans pursuant to this within Agreement may be paid in the currency in which such expenses are incurred unless Cantrans is obliged for reasons beyond its control to disburse Canadian or United States funds to purchase foreign currency, in which case Cantrans shall be paid in Canadian or United States funds as the case may be."

Assuming therefore that Order 11, rule 1(j) is applicable, have the appellants property within the jurisdiction? At best, it is a contingent claim (clause 16(g)). As MARA is under obligation to pay the appellants to their account with the Royal Bank of Canada, even if this claim can be regarded as property, it would not be property within the jurisdiction *which could be made available* to satisfy the claim of the respondent.

I would therefore allow this appeal with costs here and in the court below. The order of the Senior Assistant Registrar granting leave to serve out of the jurisdiction is accordingly set aside. The deposit of $500 will be refunded to the appellants.

Azmi L.P. and **Ali F.J.** concurred.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; Skrine & Co.*